

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

UNITED STATES OF AMERICA,

Plaintiff,

V.

APPROXIMATELY ONE MILLION  
SEVEN HUNDRED EIGHTY FOUR  
THOUSAND (1,784,000)  
CONTRABAND CIGARETTES OF  
ASSORTED BRANDS FROM THE  
INDIAN COUNTRY SMOKE SHOP  
MAIN STORE, et al.,

## Defendants.

CASE NO. C12-5992 BHS

ORDER GRANTING  
PLAINTIFF'S MOTION TO STAY  
DISCOVERY, REQUESTING  
ADDITIONAL BRIEFING ON  
PLAINTIFF'S MOTION TO  
STRIKE CLAIMS, AND  
STAYING CLAIMANTS' CROSS  
MOTION FOR SUMMARY  
JUDGMENT

This matter comes before the Court on the United States' (the "Government")

motion to strike claims (Dkt. 56) and its motion to stay discovery (Dkt. 57). Also before the Court is the summary judgment motion (Dkt. 62) of the Estate of Edward Comenout

Jr. (the “Estate”) and Nicholas P. Matheson (“Matheson”) (collectively “Claimants”).

The Court has considered the pleadings filed in support of and in opposition to the motions and the remainder of the file and hereby (1) requests additional briefing on the

1 motion to strike; (2) grants the motion for stay of discovery; and (3) stays the motion for  
2 summary judgment as stated herein.

3 **I. PROCEDURAL HISTORY**

4 On November 16, 2012, the Government filed its verified civil forfeiture  
5 complaint and notice of the complaint. Dkt. 1. On December 31, 2012, Claimants filed  
6 claims and notices of appearance. Dkts. 5– 8. On January 11, 2013, Matheson filed a  
7 motion to dismiss the forfeiture complaint. Dkt. 11. On January 14, 2013, the Estate also  
8 filed a motion to dismiss. Dkt. 12.

9 On February 15, 2013, the Government moved to file an amended verified  
10 complaint. Dkt. 22. On February 19, the Government responded to Claimants' motions to  
11 dismiss. Dkts. 23, 24. On March 11, the Court granted the Government's motion for  
12 leave to amend. Dkt. 25.

13 On March 19, 2013, the Government filed its amended verified complaint. Dkt.  
14 26. On March 29, 2013, the Court denied Claimants' motions to dismiss. Dkt. 27.

15 On August 18, 2016, the Government moved to strike Claimants' claims pursuant  
16 to Supplemental Rule G(8)(c)(i) for Claimants' failure to comply with Supplemental Rule  
17 G(5)(b). Dkt. 56. On August 19, 2016, the Government moved to stay discovery pending  
18 the outcome of its motion to strike. Dkt. 57.

19 On August 26, 2016, Claimants responded to the motion to stay discovery. Dkt.  
20 58. On September 2, 2016, the Government replied. Dkt. 59. On September 5, 2016,  
21 Claimants responded to the Government's motion to strike claims. Dkt. 60. Claimants  
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1 also moved for summary judgment. Dkt. 62. On September 6, 2016, Claimants re-filed  
2 their response to the Government's motion to strike. Dkt. 64.

3 On September 6, 2016, Claimants filed a stipulation and proposed order for the  
4 timing of the motion to strike claims and the motion for summary judgment. Dkt. 65.  
5 Claimants elected to rely on their response to the motion to strike filed on September 6,  
6 2016, and the parties agreed to note Claimants' motion for summary judgment for  
7 October 14, 2016. *Id.* at 2. On September 7, 2016, the Court agreed to the stipulated order  
8 and briefing schedule. Dkt. 66.

9 On September 9, 2016, the Government replied on its motion to strike claims. Dkt.  
10 67. On October 11, 2016, the Government responded to Claimants' motion for summary  
11 judgment. Dkt. 68.

12 **II. DISCUSSION**

13 **A. Motion to Strike**

14 The Government moves to strike Claimants' claims pursuant to Supplemental  
15 Rule G(8)(c)(i) for Claimants' failure to comply with Supplemental Rule G(5)(b) by  
16 filing an answer. Dkt. 56.

17 **1. Standard**

18 A motion pursuant to Rule G(8)(c)(i) may "be presented" in one of two ways: "as  
19 a motion for judgment on the pleadings or as a motion to determine . . . by summary  
20 judgment whether the claimant can carry the burden of establishing standing by a  
21 preponderance of the evidence." Fed. R. Civ. P. Supp. R. G(8)(c)(ii)(B). Because the  
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1 Government has failed to state a standard for their motion, the Court must decide the  
2 appropriate standard of review.

3 The Court determines that the Government's motion is best considered under the  
4 motion for summary judgment standard rather than that for a judgment on the pleadings.

5 Motions for judgments on the pleadings are permitted only after the pleadings are closed,  
6 Fed. R. Civ. P. 12(c), and the entire basis of the Government's motion is that Claimants  
7 have failed to file the required answer to the complaint.

8 Summary judgment "should be rendered if the pleadings, the discovery and  
9 disclosure materials on file, and any affidavits [or declarations] show that there is no  
10 genuine issue as to any material fact and that the movant is entitled to judgment as a  
11 matter of law." Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S.  
12 242, 247–48 (1986). The moving party is entitled to judgment as a matter of law when  
13 the nonmoving party fails to make a sufficient showing on an essential element of a claim  
14 in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v.*  
15 *Catrett*, 477 U.S. 317, 323 (1986). There is no genuine issue of fact for trial where the  
16 record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving  
17 party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)  
18 (nonmoving party must present specific, significant probative evidence, not simply "some  
19 metaphysical doubt"). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over  
20 a material fact exists if there is sufficient evidence supporting the claimed factual dispute,  
21 requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty*

1 *Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

3 **2. Rule G(8)(c)(i)(A)**

4 The Government first argues that the Court should strike the claims pursuant to  
 5 Rule G(8)(c)(i)(a) because Claimants have failed to file an answer. Dkt. 56. Claimant's  
 6 claim is governed by the Supplemental Rules for Admiralty and Maritime Claims. 18  
 7 U.S.C. § 983(a)(4)(A). Supplemental Admiralty and Maritime Claims Rule G(5)(a)(i)  
 8 allows potential claimants who receive notice to contest a forfeiture by filing a claim by  
 9 the date set forth in the notice, which must be "at least 35 days after the notice is sent."  
 10 Fed. R. Civ. P. Supp. R. G(5)(a)(ii)(A), (4)(b)(ii)(B). The claim must identify the  
 11 claimant and the property claimed, state the claimant's interest in the property, and be  
 12 signed by the claimant under penalty of perjury. Fed. R. Civ. P. Supp. R. G(5)(a)(i)(A)–  
 13 (C). After a proper claim is filed, Rule G(5)(b) further provides that a "claimant must  
 14 serve and file an answer to the complaint or a motion under Rule 12 within 21 days after  
 15 filing the claim." Fed. R. Civ. P. Supp. R. G(5)(b).

16 The Government argues that the Court should strike the claims pursuant to Rule  
 17 G(8)(c), which provides:

- 18 (c) Motion to Strike a Claim or Answer
  - 19 (i) At any time before trial, the government may move to strike a  
 claim or answer:
    - 20 (a) *for failing to comply with Rule G(5) or (6)*, or
    - (b) because the claimant lacks standing.

21 Fed. R. Civ. P. Supp. R. G(8)(c) (emphasis added). Additionally, the Government cites  
 22 18 U.S.C. 983(a)(4)(B), which states that "a person asserting an interest in seized

1 property, shall file an answer to the government's complaint for forfeiture no later than  
2 20 days after the date of the filing of the claim."

3       Claimants argue that the Government's motion should be analyzed under the  
4 general test for setting aside default under Federal Rule of Civil Procedure 55, rather than  
5 the strict compliance standard many courts have required under the Supplemental  
6 Admiralty and Maritime Claims Rules that govern forfeiture *in rem* proceedings. Dkt. 64  
7 at 6–8. To support their position Claimants cite *United States v. Signed Pers. Check No.*  
8 *730 of Yubran S. Mesle*, 615 F.3d 1085, 1089 (9th Cir. 2010) ("Mesle"), where the Ninth  
9 Circuit reversed the decision of a district court because it failed to apply a "good cause"  
10 analysis when refusing to set aside a default entered pursuant to Federal Rule of Civil  
11 Procedure 55 against a *pro se* litigant. However, in *Mesle*, the court was ruling on a  
12 motion for default judgment pursuant to Federal Rule of Civil Procedure 55. Here, the  
13 Government has moved to strike the claim pursuant to Rule G(8)(c).

14       An isolated reading of Rule G(8)(c) suggests that Claimants' failure to file a  
15 timely answer—a clear violation of Rule G(5)(b)—may result in the Court striking the  
16 claims. The Government has also provided some authority, although nonbinding, to  
17 support this position. Dkt. 56 at 5–6 (citing *United States v. All Assets Held at Bank*  
18 *Julius Baer & Co., Ltd.*, 664 F. Supp. 2d 97, 102–03 (D.D.C. 2009); *United States v. 40*  
19 *Acres of Real Prop., More or Less*, 629 F. Supp. 2d 1264, 1272–75 (S.D. Ala. 2009)).

20       The Court recognizes that, pursuant to a Rule G(8)(c)(i)(A) motion, failure to  
21 comply with the timing requirements of Rule G(5)(a) may serve as a basis for striking an  
22 untimely claim, while the failure to follow the timing set forth in Rule G(5)(b) can serve

1 as a legitimate basis for striking an untimely answer. *See, e.g., United States v.*  
2 *\$11,500.00 in U.S. Currency*, 710 F.3d 1006, 1012 (9th Cir. 2013); *United States v.*  
3 *Twenty Three Thousand Three Hundred And Twenty Three Dollars (\$23,323.00) in U.S.*  
4 *Currency*, CIV.09-00428 JMS-LEK, 2010 WL 532441, at \*3 (D. Haw. Feb. 16, 2010),  
5 *report and recommendation adopted*, CIV.09-00428JMS/LEK, 2010 WL 935198 (D.  
6 Haw. Mar. 11, 2010); *United States v. 2003 Volkswagen Passat Washington License*  
7 *Plate 709 YUV VIN WVVUK63B53P343877*, CV-09-3087-EFS, 2011 WL 1576223, at  
8 \*4–5 (E.D. Wash. Apr. 26, 2011). It is similarly understandable that the Court may strike  
9 an answer where a claimant has failed to file a claim that conforms to the requirements of  
10 Rule G(5)(a), as the language of G(5)(b) suggests that filing a claim is a prerequisite to  
11 filing an answer. *See United States v. \$86,496.00 in U.S. Currency*, CV-07-1693-PHX-  
12 DGC, 2008 WL 2039355, at \*3–4 (D. Ariz. May 12, 2008).

13 However, the Court also notes that Rule G(5) addresses the procedural  
14 requirements for effectively filing a claim or an answer in separate subparts. While Rule  
15 G(5)(a) sets forth the requirements for filing a claim, Rule G(5)(b) sets forth the  
16 requirements for filing an answer to the complaint. *See Fed. R. Civ. P. Supp. R. G(5).*  
17 While the Government has referenced two district court cases (from other jurisdictions)  
18 indicating that an untimely answer should allow the Court to strike a claim, the  
19 Government has failed to articulate any actual line of reasoning for why the failure to file  
20 an answer under G(5)(b) should serve as the basis for striking a claim that satisfies the

1 requirements of Rule G(5)(a).<sup>1</sup> Moreover, the cases cited by the Government applied an  
 2 interpretation of “statutory standing” in the context of Rule G(8)(c) that the Ninth Circuit  
 3 appears to have implicitly rejected. *See United States v. Real Prop. Located at 17 Coon*  
 4 *Creek Rd., Hawkins Bar California, Trinity Cty.*, 787 F.3d 968, 973–74 (9th Cir. 2015).

5 The Court is concerned that Claimants’ failure to file a timely answer should not  
 6 serve as a basis to strike their claims under Rule G(8)(c)(i)(A), especially where it  
 7 appears that a Rule 55 motion for entry of default and default judgment is the appropriate  
 8 avenue for the Government to pursue the relief it presently seeks.<sup>2</sup> However, before  
 9 denying the Government’s motion to strike, the Court will afford the Government and  
 10 Claimants the opportunity to more fully address the following questions:

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14       <sup>1</sup> The Court does not at this time determine whether Claimants satisfied the requirements  
 15 of G(5)(a) substantively or procedurally. Nonetheless, absent any argument to the contrary, the  
 16 Court will presume that Claimants have satisfied Rule G(5)(a) for the purposes of this motion.

17       <sup>2</sup> The Court notes that numerous unpublished district court decisions, and some that are  
 18 published, suggest that a motion for entry of default and default judgment is the proper avenue  
 19 for the Government to seek the relief it now requests. *See, e.g., United States v. One 2003*  
*20 Mercedes Benz CL500*, PWG-11-3571, 2013 WL 5530325 (D. Md. Oct. 3, 2013); *United States*  
*21 v. U.S. Currency in Amount of \$13,000*, No. 12-811-CV-C-NKL, 2012 WL 5422316 (W.D.Mo.  
 22 Nov. 6, 2012); *United States v. \$2,041.00 in U.S. Currency*, No. 12-CV-87, 2012 WL 6953388  
 (E.D.Tex. Oct. 30, 2012), *report and recommendation adopted*, 2012 WL 356707 (E.D.Tex. Jan.  
 29, 2013); *United States v. 15 Trimont Lake Road*, No. 2:10cv16, 2011 WL 309921 (W.D.N.C.  
 Jan. 28, 2011); *Twenty Three Thousand Three Hundred And Twenty Three Dollars (\$23,323.00)*  
 in *U.S. Currency*, 2010 WL 532441 (D. Haw. Feb. 16, 2010); *United States v. \$186,907.00 in*  
*U.S. Currency*, No. 07-3229, 2008 WL 2331610 (D. Minn. June 3, 2008); *United States v. Real*  
*Property Known & Numbered as 2621 Bradford Dr., Middletown, Butler Cnty., Ohio*, No. 07-  
 cv-875, 2008 WL 630601 (S.D. Ohio March 7, 2008); *United States v. \$138,381 in U.S.*  
*Currency*, 240 F.Supp.2d 220, 233 (E.D.N.Y. 2003); *United States v. Cadillac One 2002*  
*Escalade, V # 3GYEK63N82G226161, DEL EXT E-SPORT*, No. 02-C-7015, 2003 WL  
 22220264 (N.D. Ill. Sept. 25, 2003)

1. Does Rule G(8)(c)(i)(A) authorize the Court to strike a claim that satisfies the requirements of Rule G(5)(a) when a claimant fails to file a timely answer under Rule G(5)(b)?
2. If yes to Question 1, what standard or factors must the Court consider before striking the claim?

6 Accordingly, the Court requests that the parties submit simultaneous additional  
7 briefing. The parties may file additional briefing, not to exceed eight pages, on or before  
8 October 28, 2016. The parties may then file their response to the opposing party's  
9 additional briefing, not to exceed five pages, on or before November 4, 2016. The  
10 Government's motion to strike (Dkt. 56) is renoted for November 4, 2016.

11 Alternatively, the Government may withdraw its present motion to strike and  
12 pursue a default and default judgment pursuant to Federal Rule of Civil Procedure 55.

### 3. Rule G(8)(c)(i)(B)

14 The Government next argues that the Court should strike the claims pursuant to  
15 Rule (G)(8)(c)(i)(b) for lack of standing because Claimants have failed to file an answer.

16 To pursue a claim, the claimant must demonstrate, in addition to the  
17 usual requirement of establishing Article III standing, compliance with the  
18 *jurisdictional procedural requirements* set forth in Supplemental Rule  
G(5). Many courts refer to the latter as “statutory standing” and have held  
that it is established through compliance with Rule G.

19 *Real Prop. Located at 17 Coon Creek Rd.*, 787 F.3d at 973–74 (citations omitted)  
20 (emphasis added). However, the Ninth Circuit has recently explained that the term  
21 “‘standing’ is something of a misnomer [in this context], as courts have discretion to  
22 overlook the failure to conform to the requirements of forfeiture claim rules.” *Id.* at 974

1 (citation, quotation marks, and internal brackets omitted). Moreover, the Ninth Circuit  
2 has explained that “[c]onstruing a claimant’s failure to comply with Rule G(5) or G(6) to  
3 require automatic dismissal, as if it were a statutory standing defect, would appear to  
4 render subpart (B) of Rule G(8)(c)(i) redundant, violating a fundamental canon of  
5 construction.” *Id.* at 976. Accordingly, under *Real Prop. Located at 17 Coon Creek Rd.*,  
6 787 F.3d at 974, strict compliance with the timing requirements of Rule G(5)(b) does not  
7 appear to be the type of “standing” contemplated under Rule G(8)(c)(i)(b). The Court  
8 therefore denies the Government’s motion on this issue.

9 **B. Motion for Summary Judgment**

10 Claimants move for summary judgment on a cross motion (Dkt. 62) seeking  
11 dismissal of the Government’s complaint. However, pursuant to Rule G(c)(ii)(A), the  
12 Government’s motion to strike “must be decided before any motion by the claimant to  
13 dismiss the action.” The Court therefore stays Claimant’s motion for summary judgment  
14 seeking dismissal of the complaint. Claimant’s motion for summary judgment is renoted  
15 for November 4, 2016.

16 **C. Motion to Stay Discovery**

17 The Government also moves to stay discovery pending the outcome of its motion  
18 to strike. Dkt. 57. Matheson argues that the Government has failed to outline a procedure  
19 whereby it may move for a stay of discovery. Dkt. 58 at 2.

20 Matheson has served the Government with interrogatories, request for production  
21 of documents, and requests for admission pursuant Federal Rules of Civil Procedure 33,  
22 34, and 36. Dkt. 58. Rule 33(a)(2) provides: “the court may order that the interrogatory

1 need not be answered until designated discovery is complete, or until a pretrial  
2 conference or some other time.” Both Rule 34(b)(2)(A) and Rule 36(a)(3) state: “a  
3 shorter or longer time [for responding to requests for production or admission] may be  
4 stipulated to under Rule 29 or be ordered by the Court.”

5 Claimants have failed to file answers as required under Rule G(5)(b). The Court  
6 agrees that it would unjustly burden and prejudice the Government to allow Claimants to  
7 pursue discovery when they have yet failed to file necessary pleadings under the  
8 supplemental rules, especially when those pleadings can narrow and define the scope of  
9 discovery. Moreover, allowing Matheson to seek discovery at this time could also prove a  
10 wasteful endeavor, as the Government’s motion to strike his claim is currently pending  
11 before the Court. Therefore, pursuant to its authority set forth in Rules 33(a)(2),  
12 34(b)(2)(A), and Rule 36(a)(3), the Court stays Matheson’s discovery to the Government  
13 pending the resolution of the Government’s motion to strike and the filing of an  
14 appropriate answer to the complaint.<sup>3</sup>

### 15 III. ORDER

16 Therefore, it is hereby **ORDERED** that the Government’s motion to stay (Dkt. 57)  
17 discovery is **GRANTED**. The Government’s motion to strike claims (Dkt. 56) and  
18 Claimants’ cross motion for summary judgment (Dkt. 62) are renoted for November 4,  
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21 <sup>3</sup> To address Matheson’s repeated concerns about filing the statutorily mandated answer,  
22 the Court notes that Matheson may preserve any argument based on lack of *in rem* jurisdiction  
by noting an objection in his answer. Fed. R. Civ. P. Supp. R. G(5)(b).

1 2016, as detailed above. Additional briefing shall be filed pursuant to the scope, schedule,  
2 and page limits outlined above.

3 Dated this 18th day of October, 2016.

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6 BENJAMIN H. SETTLE  
7 United States District Judge  
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